

# **EXHIBIT**

# **39**

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
TRAVELERS CASUALTY AND SURETY  
COMPANY as Administrator for RELIANCE  
INSURANCE COMPANY

Plaintiff,

vs

DORMITORY AUTHORITY - STATE OF NEW YORK,  
TDX CONSTRUCTION CORP. and KOHN,  
PEDERSON, FOX & ASSOCIATES, P.C.,

Defendants.

-----X  
DORMITORY AUTHORITY OF THE STATE OF  
NEW YORK AND TDX CONSTRUCTION CORP.,

Third-Party Plaintiff,

vs

TRATAROS CONSTRUCTION, INC.,

Third-Party Defendants,

-----X  
TRATAROS CONSTRUCTION, INC. and  
TRAVELERS CASUALTY AND SURETY  
COMPANY,

Fourth-Party Plaintiffs,

vs

CAROLINA CASUALTY INSURANCE COMPANY,  
BARTEC INDUSTRIES INC., DAYTON SUPERIOR  
SPECIALTY CHEMICAL CORP., a/k/a DAYTON  
SUPERIOR CORPORATION, SPECIALTY  
CONSTRUCTION BRANDS, INC. t/a TEC, KEMPER  
CASUALTY INSURANCE COMPANY d/b/a  
KEMPER INSURANCE COMPANY, GREAT  
AMERICAN INSURANCE COMPANY, NATIONAL  
UNION FIRE INSURANCE COMPANY OF  
PITTSBURGH, P.A., UNITED STATES FIRE  
INSURANCE COMPANY, ALLIED WORLD  
ASSURANCE COMPANY (U.S) INC. f/k/a  
COMMERCIAL UNDERWRITERS INSURANCE

Case No. 07-CV-6915 (DLC)  
ECF CASE

**ANSWER TO  
FOURTH-PARTY  
COMPLAINT WITH  
CROSS-CLAIMS AND  
COUNTERCLAIM**

COMPANY, ZURICH AMERICAN INSURANCE  
COMPANY d/b/a ZURICH INSURANCE COMPANY,  
OHIO CASUALTY INSURANCE COMPANY d/b/a  
OHIO CASUALTY GROUP, HARLEYSVILLE  
MUTUAL INSURANCE COMPANY (a/k/a  
HARLEYSVILLE INSURANCE COMPANY, JOHN  
DOES 1-20, and XYZ CORPS. 1-20,

Fourth-Party Defendants,

-----X

**SIRS:**

**PLEASE TAKE NOTICE**, that defendant, **BARTEC INDUSTRIES, INC.**, by it's attorneys, **O'CONNOR REDD, LLP** as and for it's Answer to Fourth-Party Plaintiffs, Trataros Construction, Inc. And Travelers Casualty and Surety Company's Fourth-Party Complaint, sets forth the following, upon information and belief:

**As to a Response to Parties, Jurisdiction, and Venue**

**FIRST:** Denies any knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in the paragraphs of the Fourth-Party Complaint marked and designated "1", "2", "3", "5", "6", "7", "8", "9", "10", "11", "12", "13" and "14".

**SECOND:** Admitted as to the allegations in the paragraph of the Fourth-Party Complaint marked and designated "4".

**THIRD:** Denies each and every allegation contained in the paragraphs of the Fourth-Party Complaint marked and designated "15" and "16" and respectfully refers all questions of law to the Court and all questions of fact to the trier of fact.

**As to a Response to Interested Non-Parties**

**FOURTH:** Denies any knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in the paragraph of the Fourth-Party Complaint marked and designated "17".

**FIFTH:** Denies each and every allegation contained in the paragraph of the Fourth-Party Complaint marked and designated "18" and respectfully refers all questions of law to the Court and all questions of fact to the trier of fact, and further states that Crocetti is a necessary and indispensable party to this litigation.

**As to a Response to Procedural Background**

**SIXTH:** Denies any knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in the paragraphs of the Fourth-Party Complaint marked and designated "19", "20", "21", "22", "23", "24", "25", "26", "27", "28" and "29".

**As to a Response to Facts Common to All Counts**

**SEVENTH:** Denies any knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in the paragraphs of the Fourth-Party Complaint marked and designated "30", "31", "32", "33", "34", "35", "36", "37", "38", "39", "40", "41", "42", "43", "44", "45", "48", "52", "53", "54", "55", "56", "57", "58", "59", "60" and "61".

**EIGHTH:** Denies each and every allegation contained in the paragraphs of the Fourth-Party Complaint marked and designated "46", "47" and "49", and specifically refers to the terms of the subcontract referred to therein.

**NINTH:** Admitted as to the allegations in the paragraph of the Fourth-Party Complaint marked and designated "50" and "51", except to specifically refer to the terms of the subcontract referred to therein.

**ANSWERING THE FIRST COUNT**  
*(Contractual Indemnification & Exoneration against Bartec)*

**TENTH:** As to paragraph "62" of the fourth-party plaintiffs, Fourth-Party Complaint, the answering defendant repeats, realleges and reiterates each and every denial of the allegations contained in the paragraphs of the Fourth-Party Complaint marked and designated "1" through "61" as if said denials were more fully and specifically set forth at length herein.

**ELEVENTH:** Denies any knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in the paragraph of the Fourth-Party Complaint marked and designated "63".

**TWELFTH:** Denies each and every allegation contained in the paragraphs of the Fourth-Party Complaint marked and designated "64", "65", "66", "67", "68", "69" and "70", and respectfully refers all questions of law to the Court and all questions of fact to the trier of fact.

**ANSWERING THE SECOND COUNT**  
*(Breach of Subcontract, Common-Law Indemnification,  
Contribution & Exoneration against Bartec)*

**THIRTEENTH:** As to paragraph "71" of the fourth-party plaintiffs, Fourth-Party

Complaint, the answering defendant repeats, realleges and reiterates each and every denial of the allegations contained in the paragraphs of the Fourth-Party Complaint marked and designated "1" through "70" as if said denials were more fully and specifically set forth at length herein.

**FOURTEENTH:** Denies each and every allegation contained in the paragraphs of the Fourth-Party Complaint marked and designated "72", "73", "74", "75", "76", and "77", and respectfully refers all questions of law to the Court and all questions of fact to the trier of fact.

**ANSWERING THE THIRD COUNT**

*(Professional Negligence, Simple Negligence, Common-Law  
Indemnification, Contribution & Exoneration against Bartec)*

**FIFTEENTH:** As to paragraph "78" of the fourth-party plaintiffs, Fourth-Party Complaint, the answering defendant repeats, realleges and reiterates each and every denial of the allegations contained in the paragraphs of the Fourth-Party Complaint marked and designated "1" through "77", as if said denials were more fully and specifically set forth at length herein.

**SIXTEENTH:** Denies each and every allegation contained in the paragraphs of the Fourth-Party Complaint marked and designated "79", "80", "81", "82", "83" and "84", and respectfully refers all questions of law to the Court and all questions of fact to the trier of fact.

**ANSWERING THE FOURTH COUNT**

*(Performance Bond Claim against Carolina Casualty by Trataros)*

**SEVENTEENTH:** As to paragraph "85" of the fourth-party plaintiffs, Fourth-Party Complaint, the answering defendant repeats, realleges and reiterates each and every denial of the allegations contained in the paragraphs of the Fourth-Party Complaint marked and designated "1" through "84" as if said denials were more fully and specifically set forth at length herein.

**EIGHTEENTH:** Denies any knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in the paragraphs of the Fourth-Party Complaint marked and designated "86", "87" and "88".

**ANSWERING THE FIFTH COUNT**

*(Performance Bond Claim against Carolina Casualty by Travelers)*

**NINETEENTH:** As to paragraph "89" of the fourth-party plaintiffs, Fourth-Party Complaint, the answering defendant repeats, realleges and reiterates each and every denial of the allegations contained in the paragraphs of the Fourth-Party Complaint marked and designated "1" through "88" as if said denials were more fully and specifically set forth at length herein.

**TWENTIETH:** Denies any knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in the paragraphs of the Fourth-Party Complaint marked and designated "90", "91", "92", "93", "94", "95" and "96".

**ANSWERING THE SIXTH COUNT**

*(Negligence, Breach of Contract, Breach of Warranty - Indemnification,  
Contribution & Exoneration against Dayton Superior)*

**TWENTY-FIRST:** As to paragraph "97" of the fourth-party plaintiffs, Fourth-Party Complaint, the answering defendant repeats, realleges and reiterates each and every denial of the allegations contained in the paragraphs of the Fourth-Party Complaint marked and designated "1" through "96" as if said denials were more fully and specifically set forth at length herein.

**TWENTY-SECOND:** Denies any knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in the paragraphs of the Fourth-Party Complaint marked and designated "98", "99", "100", "101", "102", "103" and "104".

**ANSWERING THE SEVENTH COUNT**

*(Negligence, Breach of Contract, Breach of Warranty - Indemnification,  
Contribution & Exoneration against TEC)*

**TWENTY-THIRD:** As to paragraph "105" of the fourth-party plaintiffs, Fourth-Party Complaint, the answering defendant repeats, realleges and reiterates each and every denial of the allegations contained in the paragraphs of the Fourth-Party Complaint marked and designated "1" through "104" as if said denials were more fully and specifically set forth at length herein.

**TWENTY-FOURTH:** Denies any knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in the paragraphs of the Fourth-Party Complaint marked and designated "106", "107", "108", "109", "110", "111" and "112".



**ANSWERING THE EIGHTH COUNT**

*(Breach of Contract(s), Professional Negligence and/or Simple Negligence-  
Indemnification, Contribution & Exoneration against John Does 1-20  
and XYZ Corps. 1-20)*

**TWENTY-FIFTH:** As to paragraph "113" of the fourth-party plaintiffs, Fourth-Party Complaint, the answering defendant repeats, realleges and reiterates each and every denial of the allegations contained in the paragraphs of the Fourth-Party Complaint marked and designated "1" through "112" as if said denials were more fully and specifically set forth at length herein.

**TWENTY-SIXTH:** Denies any knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in the paragraphs of the Fourth-Party Complaint marked and designated "114", "115", "116", "117", "118", "119", "120" and "121".

**ANSWERING THE NINTH COUNT**

*(Insurance Coverage - Declaratory Judgment, Indemnification, Contribution &  
Exoneration against Kemper, Great American, National Union, US Fire, Allied World,  
Zurich, Ohio Casualty, Harleysville, and XYZ Corps. 1-20)*

**TWENTY-SEVENTH:** As to paragraph "122" of the fourth-party plaintiffs, Fourth-Party Complaint, the answering defendant repeats, realleges and reiterates each and every denial of the allegations contained in the paragraphs of the Fourth-Party Complaint marked and designated "1" through "121" as if said denials were more fully and specifically set forth at length herein.

**TWENTY-EIGHTH:** Denies any knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in the paragraphs of the Fourth-Party

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Complaint marked and designated "123", "124", "125", "126", "127", "128", "129", "130", "132", "133", "134", "136", "137", "140", "141", "142", "143", "144" and "149".

**TWENTY-NINTH:** Denies each and every allegation contained in the paragraphs of the Fourth-Party Complaint marked and designated "131", "139", "145", "146", "147" and "148" and respectfully refers all questions of law to the Court and all questions of fact to the trier of fact.

**THIRTIETH:** Denies each and every allegation contained in the paragraph of the Fourth-Party Complaint marked and designated "135" and respectfully refers all questions of law to the Court and all questions of fact to the trier of fact with respect to allegations made with respect to fourth-party defendant, Bartec and denies any knowledge or information sufficient to form a belief as to the truth or falsity with respect to all other allegations.

**THIRTY-ONE:** Admitted as to the allegations in the paragraph of the Fourth-party Complaint marked and designated "138".

**AS AND FOR A FIRST SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE**

**THIRTY-TWO:** Any injuries and/or damages sustained by the Fourth-Party Plaintiff, as alleged in the Fourth-Party Plaintiff's complaint herein, which the answering fourth-party defendant denies, were caused, in whole or in part, by the contributory negligence and/or culpable conduct of the other parties including the Fourth-Party Plaintiff and not as a result of any negligence and/or culpable conduct on the part of the answering Fourth-Party defendant.

**AS AND FOR A SECOND SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE**

**THIRTY-THREE:** Upon information and belief, the injuries and damages, if any, allegedly sustained by the Fourth-Party Plaintiff as alleged in the Complaint were caused by third parties other than the answering defendant and, by reason of the foregoing, the Complaint should be dismissed as to this answering defendant.

**AS AND FOR A THIRD SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE**

**THIRTY-FOURTH:** The causes of action set forth in the Complaint fail to state a claim upon which relief can be granted.

**AS AND FOR A FOURTH SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE**

**THIRTY-FIFTH:** A necessary or indispensable party has not been joined and, therefore, the action should not proceed and should be dismissed.

**AS AND FOR A FIFTH SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE**

**THIRTY-SIXTH:** Pursuant to the provisions Article 16 of the CPLR, should this answering fourth-party defendant be found liable for damages, such liability being 50 percent or less of the total liability assigned to all persons liable, the liability of this answering fourth-party defendant for non-economic loss shall not exceed its equitable share determined in accordance with the relative culpability of all parties liable.

**AS AND FOR A SIXTH SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE**

**THIRTY-SEVENTH:** The provisions, requirements, and terms of CPLR Article 16, §1601, et. seq. apply to the action and non-compliance with such provisions, requirements or terms operates to vitiate Fourth-Party Plaintiff's right to maintain the subject action, and any verdict Fourth-Party Plaintiff may recover thereby.

**AS AND FOR A SEVENTH SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE**

**THIRTY-EIGHTH:** The negligence of a third person or entity over whom this answering fourth-party defendant had no control was a superseding cause and insulates the answering fourth-party defendant from liability.

**AS AND FOR A EIGHTH SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE**

**THIRTY-NINTH:** Fourth-Party Plaintiff failed to exercise ordinary care to effect a cure and to prevent aggravation of the alleged injury and damages.

**AS AND FOR A NINTH SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE**

**FOURTEETH:** Fourth-Party Plaintiff is estopped from recovering from the answering defendant by reason that the Fourth-Party Plaintiff and/or its agent examined and inspected the Conflow and other materials received by it and thereafter accepted such goods and confirm that said goods met the specifications required by Fourth-Party

Plaintiff and that it was satisfactory to Fourth-Party Plaintiff for its particular purposes as required by Fourth-Party Plaintiff.

**AS AND FOR A CROSS-CLAIM AGAINST THE FOURTH-PARTY DEFENDANTS, CAROLINA CASUALTY INSURANCE COMPANY, DAYTON SUPERIOR SPECIALTY CHEMICAL CORP., a/k/a DAYTON SUPERIOR CORPORATION, SPECIALTY CONSTRUCTION BRANDS, INC. t/a TEC, KEMPER CASUALTY INSURANCE COMPANY d/b/a KEMPER INSURANCE COMPANY, GREAT AMERICAN INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, P.A., UNITED STATES FIRE INSURANCE COMPANY, ALLIED WORLD ASSURANCE COMPANY (U.S) INC. f/k/a COMMERCIAL UNDERWRITERS INSURANCE COMPANY, ZURICH AMERICAN INSURANCE COMPANY d/b/a ZURICH INSURANCE COMPANY, OHIO CASUALTY INSURANCE COMPANY d/b/a OHIO CASUALTY GROUP, HARLEYSVILLE MUTUAL INSURANCE COMPANY (a/k/a HARLEYSVILLE INSURANCE COMPANY, JOHN DOES 1-20, and XYZ CORPS. 1-20**

**FORTY-ONE:** If Fourth-Party Plaintiff sustained any injuries or damages as alleged in the Fourth-Party Complaint, which this answering fourth-party defendant denies, then such injuries or damages were caused by reason of the culpable conduct, acts or omissions, negligence, strict products liability, statutory violation, breach of contract, obligation or warranty of the co-defendant above-named.

By reason of the foregoing, this answering fourth-party defendant is entitled to indemnification or contribution from, and to have judgment against the co-defendants above-named, for all part of any verdict or judgment that Fourth-Party Plaintiff may recover against this answering fourth-party defendant.

**AS AND FOR A FULL AND COMPLETE COUNTERCLAIM AGAINST  
FOURTH-PARTY PLAINTIFFS, TRATAROS CONSTRUCTION, INC. and  
TRAVELERS CASUALTY AND SURETY COMPANY.**

That if the third-party plaintiffs herein recovers a judgment against the fourth-party plaintiffs, said judgment will have been caused and brought about by the primary negligence of the said fourth-party plaintiff in that the fourth-party plaintiff conducted itself in such a manner as to cause the accident and damages complained of and was otherwise negligent in the premises and was guilty of breaches of duty and/or warranty and/or contract which duties were imposed by statute and/or agreement and/or implied in laws and without any negligence or breach of any duty by this answering fourth-party defendant whose negligence, if any, was secondary in nature so that if said fourth-party plaintiff should have determination of ultimate responsibility and judgment over and against the said fourth-party plaintiff, for the same amount or such proportionate amount of any said judgment and damages as the fourth-party plaintiff is found to have caused or be responsible for together with all costs of investigation expenses, attorneys' fees, costs and disbursements incurred in the defense of this action and in the conduct of the counterclaim.

**WHEREFORE**, the answering fourth-party defendant demands judgment as follows:

(A) Dismissing the fourth-party plaintiffs, Fourth-Party Complaint as against this answering fourth-party defendant together with the costs and disbursements of this action;

In the alternative and, in the event fourth-party plaintiffs prevail, the answering fourth-party defendant demands judgment determining the respective percentages on the part of the plaintiffs and the defendants, third-party plaintiffs and the third-party defendant and thereby reducing the amount of the damages as against this answering fourth-party defendant by the respective percentage of fault;

This answering fourth-party defendant further demands that in the event said answering fourth-party defendant is found liable to fourth-party plaintiffs herein, then said answering fourth-party defendant, on the basis of apportionment of responsibility, have judgment over and against the aforementioned defendants and third-party co-defendant and third-party plaintiffs and fourth-party co-defendants, for all or part of the verdict or judgment that fourth-party plaintiffs may recover against said answering fourth-party defendant, pursuant to Dole v. Dow Chemical, together with the costs and disbursements of this action for any expenses incurred by fourth-party defendant in defense thereof, including attorneys' fees and other costs herein.

And for judgment over and against the fourth-party co-defendants and each of them, on the cross-claim, for all or part of any liability assigned to this answering fourth-party defendant.

Dated: White Plains, New York  
December 6, 2007

Yours, etc.

O'CONNOR REDD, LLP

By: 

Jeremy D. Platek  
Attorneys for Fourth-Party Defendant,

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
TRAVELERS CASUALTY AND SURETY  
COMPANY as Administrator for RELIANCE  
INSURANCE COMPANY

Plaintiff,

vs.

DORMITORY AUTHORITY - STATE OF NEW YORK,  
TDX CONSTRUCTION CORP. and KOHN,  
PEDERSON, FOX & ASSOCIATES, P.C.,

Defendants.

-----X  
DORMITORY AUTHORITY OF THE STATE OF  
NEW YORK AND TDX CONSTRUCTION CORP.,

Third-Party Plaintiff,

vs

TRATAROS CONSTRUCTION, INC.,

Third-Party Defendants,

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TRATAROS CONSTRUCTION, INC. and  
TRAVELERS CASUALTY AND SURETY  
COMPANY,

Fourth-Party Plaintiffs,

vs

CAROLINA CASUALTY INSURANCE COMPANY,  
BARTEC INDUSTRIES INC., DAYTON SUPERIOR  
SPECIALTY CHEMICAL CORP., a/k/a DAYTON  
SUPERIOR CORPORATION, SPECIALTY  
CONSTRUCTION BRANDS, INC. t/a TEC, KEMPER  
CASUALTY INSURANCE COMPANY d/b/a  
KEMPER INSURANCE COMPANY, GREAT  
AMERICAN INSURANCE COMPANY, NATIONAL  
UNION FIRE INSURANCE COMPANY OF  
PITTSBURGH, P.A., UNITED STATES FIRE  
INSURANCE COMPANY, ALLIED WORLD  
ASSURANCE COMPANY (U.S) INC. f/k/a  
COMMERCIAL UNDERWRITERS INSURANCE

Case No. 07-CV-6915 (DLC)  
**ECF CASE**

**AFFIDAVIT OF  
SERVICE**

COMPANY, ZURICH AMERICAN INSURANCE  
COMPANY d/b/a ZURICH INSURANCE COMPANY,  
OHIO CASUALTY INSURANCE COMPANY d/b/a  
OHIO CASUALTY GROUP, HARLEYSVILLE  
MUTUAL INSURANCE COMPANY (a/k/a  
HARLEYSVILLE INSURANCE COMPANY, JOHN  
DOES 1-20, and XYZ CORPS. 1-20,

Fourth-Party Defendants,

-----X

STATE OF NEW YORK            )  
  )ss.:  
COUNTY OF WESTCHESTER    )

**CODY MARDER**, being duly sworn, deposes and says that she is over the age of 18 years, that she is not a party to the above-entitled action, and that on **December 10, 2007**, she served the within **ANSWER TO FOURTH-PARTY COMPLAINT WITH CROSS-CLAIMS AND COUNTERCLAIM**, upon the following attorney(s), in the following place(s) and in the following manner:

TO: **SEE ATTACHED SERVICE LIST**

by depositing a copy of same properly enclosed in a post-paid wrapper in the Official Depository maintained and exclusively controlled by the United States, directed to said attorney(s), respectively, at said address(es) within the State designated for that purpose upon the last papers served in this action or the place where the above then kept offices, according to the best information which can be conveniently obtained.

Sworn to before me  
December 10, 2007

  
NOTARY PUBLIC

  
**CODY MARDER**

**DONNA PAOLICELLI**  
Notary - Public, State of New York  
**No. 01PA6167046**  
Qualified in Westchester County  
Commission Expires May 29, 20 11